No. 21698

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDEPENDENT QUICK SILVER COMPANY,

Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE SECRETARY OF THE INTERIOR

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I N D E X

CITATIONS

Cases:

Statute and regulation:

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OPINION BELOW

The opinion of the district court is not reproduced in the record. For convenience, it is reproduced as an appendix to this brief, infra. The court's order denying plaintiff's motion for a new trial is also reproduced in the appendix to this brief.

JURISDICTION

Jurisdiction of the district court is alleged to be based upon the Administrative Procedure Act, the Declaratory Judgment Act, the existence of a federal question and the inherent power of the court to grant injunctive relief. Appellee does not believe that jurisdiction of the district court over the Secretary of the Interior can be based upon any of the above grounds. Jurisdiction is also stated to be based on the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361 and 1391, which authorizes actions in the nature of mandamus to compel an officer or employee of the United States to perform a ministerial duty. Appellee agrees that 28 U.S.C. sec. 1361 gives the district court a limited jurisdiction over the Secretary of the Interior and that venue is based on 28 U.S.C. sec. 1391(e). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

Administrative proceedings culminating in a decision of the Secretary of the Interior (R. 17-48) held that the Surface Resources Act of July 23, 1955, providing for federal

management of the surface of unpatented mining claims, applied to the appellant's 22 mining claims. The questions presented are:

1. Whether there are any procedural errors in the administrative proceedings which would require the reversal and institution of new proceedings.

2. Whether the district court erred in finding that appellant's charges of bias on the part of the hearing examiner were groundless.

3. Whether the district court erred in finding that the decision of the Secretary of the Interior was supported by substantial evidence.

STATUTE AND REGULATION INVOLVED

Section 4 of the Act of July 23, 1955, 69 Stat. 367, 368-369, 30 U.S.C. secs. 612(a), 612(b), provides in pertinent part:

> (a) Prospecting, mining or processing operations.
>
> Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations in the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further,

That nothing in sections 601, 603, and 611-615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * * *

Section 5 of the Act of July 23, 1955, 69 Stat. 367, 369-371, 30 U.S.C. secs. 613(a), 613(c), 613(e), provides in pertinent part:

(a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public

land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

* * * * *

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in

section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise, Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing 1/ shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

1/ So in original. Probably should be "hearings".

* * * * *

(e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

43 C.F.R. sec. 1852.3-2 provides:

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted.

STATEMENT

In this action, appellant seeks to overturn an administrative decision of the Secretary of the Interior.[1/]

1/ We use the term "Secretary" in this brief, although the decision was by a subordinate acting under delegated authority.

The Secretary held in the decision being challenged (R. 17-48) that the appellant's 22 unpatented mining claims were subject to the restrictions and reservations in Section 4 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. sec. 613. The basic issue to be determined in the agency proceedings was whether or not a valuable deposit of minerals had been discovered on any of the appellant's unpatented mining claims prior to July 23, 1955, the effective date of the Surfac Resources Act. If the requirements of a discovery under the mining laws had been met prior to that date, then the provision of the Surface Resources Act would not apply. The Act, in general, provides that any mining claim located after July 23, 1955, gives the right only to use the surface for mining purposes and that the location shall be subject to the right of the United States to manage and dispose of its surface resources other than mineral deposits. The purpose of this Act was to confine the use of surface resources by mining claimants to proper purposes prior to the issuance of a patent.

The Surface Resources Act provides a detailed procedure for determining whether the United States is to have the right to manage and dispose of surface resources of unpatented mining claims which were located prior to the

passage of that Act. In accord with the provisions of that Act, a request was made by the Chief of the Forest Service, acting on behalf of the Secretary of Agriculture, that a determination be made as to who had the right to manage the surface resources of the appellant's unpatented mining claims (R. 305). The validity of the appellant's 22 mining claims was not in issue in this proceeding (App. 69). As required by statute, a request was made that public notice be given to mining claimants (R. 305). Publication, as required, was made (R. 320). Notice was also mailed to mining claimants who had in various ways been identified (R. 319). Also filed were the required certificate of examination (R. 307) and a certificate of nonexistence of tract indexes (R. 318). Within the required time appellant filed a verified statement setting forth certain information regarding his mining claims (R. 21). Upon the filing of this verified statement it became the duty of the Secretary, in compliance with 30 U.S.C. sec. 613(c), to fix the time and place for a hearing to determine the validity of the mining claims to which the claimant asserted rights contrary to the limitations and restrictions of 30 U.S.C. sec. 612. The Act provides in part that (30 U.S.C. sec. 613(c)):

> * * * The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. [Emphasis supplied.]

As required under the regulations of the Department 43 C.F.R. sec. 1852.3-2, supra, p. 11, notice was given to th appellant, by the hearing examiner, of the time and place and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held and the matters of fact and law asserted. Notice of the hearing was issued on February 14, 1962. It stated that the Forest Service would offer evidence at the hearing to prove that (R. 21):

> (a) Sufficient minerals have not been found within the limits of the claims to constitute a discovery of a valuable mineral deposit.
>
> (b) The boundaries of the claims are not distinctly marked on the ground.

The district judge, in his opinion (App. 39), has carefully outlined the proceedings which this case has gone through up to this present appeal. Rather than rephrasing this material, we adopt his recital of the facts (App. 44-47)

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit, charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface Resources Act. Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation; the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resources Act, but that the hearing examiner erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing Examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was

> reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

The mining claimant thereafter instituted this action in the district court, seeking to compel the Secretary to vacate the contest proceedings or alternatively to remand this case for a new trial (R. 4). Both parties moved for summary judgment based upon the record in the administrative proceedings (R. 6, 50).

The district judge in his opinion has fully considered the numerous contentions of the appellant which are raised again in this appeal. The charges of bias, procedural defects, lack of due process and refusal to change hearing examiners are discussed and fully answered by the district court in its comprehensive opinion. The district judge concluded that (App. 64):

> Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The district judge went on to hold that (App. 69):

> Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

From the court's order granting the Secretary's motion for summary judgment, dated September 14, 1966 (R. 143), the appellant filed a motion for a new trial (R. 144), which was denied November 30, 1966. From this final order, the appellant filed its appeal dated January 27, 1967 (R. 164).

SUMMARY OF ARGUMENT

I

The proceedings instituted to determine who shall manage the surface resources of the public domain, upon which appellant has unpatented mining claims, fully complied with

the provisions of the Surface Resources Act. No merit or prejudice has been shown to any of appellant's claims that there has been a failure to follow the statutory provisions of the Surface Resources Act.

Appellant is in no position to challenge the service of notice of these proceedings, since it responded to the notice and appeared at the agency proceedings.

II

The charge that the hearing examiner was biased due to his having signed the notice of hearing is, as the district court held, completely specious.

III

The decision of the Secretary is supported by substantial evidence. It is not the function of this Court to weigh the evidence. Upon a review of the entire administrative proceeding, if there is found substantial evidence to support the Secretary's decision, it must be affirmed.

The district court, after a thorough review of the record, has concluded that the decision of the Secretary is based on substantial evidence. That conclusion is not clearly erroneous.

IV

The administrative record amply supports the Secretary's finding that a valid discovery had not been made on the Bonanza claim. There is no support for appellant's argument that there has been discovered a large deposit of ore on that claim.

Appellant was put on notice that each of its 22 mining claims was being challenged and presented its case with this in mind. Appellant was not misled by the charges raised concerning its mining claims.

The testimony of appellee's examination shifted the burden of proof as to the existence of a discovery to the appellant.

Challenges raised to the qualification of appellee's expert witness are without merit.

The record clearly shows that the boundaries of the subject mining claims did not measure up to the required standards which would have made it impossible to have ever ascertained the exact place where the surface management rights existed, had appellant prevailed.

ARGUMENT

I

THE PROCEDURE FOLLOWED IN DETERMINING WHO IS ENTITLED TO MANAGE THE SURFACE RESOURCES OF THE APPELLANT'S UNPATENTED MINING CLAIMS FULLY COMPLIED WITH THE PROVISIONS OF 30 U.S.C. SEC. 613

The arguments presented by appellant, to the effect that it has been denied due process of law by the alleged failure of the Secretary of the Interior to follow each jurisdictional requirement of the Surface Resources Act, are completely without foundation. The district judge considered the arguments advanced by the appellant in this respect and fully answers them (App. 60-62). In this case, appellant was clearly put on notice of the proceedings. Appellant did appear and present its case but, on the conflicting evidence presented, it did not prevail. No merit has been shown to any of the appellant's claims that the administrative agency failed to follow the statutory provisions to determine who had the right to manage the surface resources of the subject unpatented mining claims. It is also quite clear that, were the administrative determination of the Secretary in this case to be reversed on the basis of appellant's highly technical arguments and a new hearing ordered to be held, no substantial difference would result in a rehearing.

The Chief of the Forest Service, by letter dated April 10, 1958 (R. 305), requested the Department of the Interior to publish notice of proceedings under the Surface Resources Act. The lands involved were described by public land survey and affidavits of examination were filed (R. 307). There could be no certificate of title or abstract of title, due to the fact that no tract indexes are maintained in the county where the mining claims were located, so a certificate of nonexistence of tract indexes in Crook County, Oregon, was filed (R. 318). Since there were no tract indexes as defined in 30 U.S.C. sec. 613(a), a certificate or abstract of title obviously could not be furnished. Certainly, the fact that the County did not maintain tract indexes did not remove the lands in that County from the operation of the Surface Resources Act. The affidavit of publication shows that the notice of the subject proceedings was published, as required (R. 320). The appellant was not served with a copy of the publication because the affidavits of examination did not show that the appellant was in possession of the mining claims. The affidavits, however, list a Mr. Frank Reid (R. 309)

who is mentioned in the transcript as being on the claims when they were examined (Tr. 42). Mr. Reid was served with notice of publication (R. 319) and evidently either he informed the appellant or notice was received by publication, since appellant responded and filed its verified statement. The district judge held (App. 62): "Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service."

It is argued by appellant that the rules of practice of the Department of the Interior were not followed in respect to the institution of this proceeding (Br. 24). Appellant argues that a complaint must still be filed in order to institute a contest. The section of the Surface Resources Act involved, 30 U.S.C. sec. 613(c), provides that procedures with respect to notice of a hearing and its conduct shall follow the then established general procedures and rules of practice of the Department. The obvious reason that a complaint need not be filed is that the publication requirements of the Act, sec. 613(a), take the place of a complaint. The district court held (App. 62) that "The use of a complaint is averted by the publication requirements of that statute."

It is clear from a reading of the Act that proceedings to ascertain who is to manage the surface resources of mining claims are to be instituted in accord with the procedure set forth in that Act. The Act provides, after stating how the proceedings are to be instituted, publication, etc., that "The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." 30 U.S.C. sec. 613(c).

This provision of the Act relates not to the institution of proceedings, as appellant would have it, but rather to the conduct of proceedings instituted in the manner Congress provided in the earlier sections. Appellant's argument produced the absurd result that, despite all those specified provisions, a formal complaint must also be filed and served. Neither the language of the statute nor good sense can justify such a conclusion.

Appellant also argues that there has been a failure to comply with the requirement that a certificate of title accompany the request for publication. The district court found that there could not be compliance, due to the fact there were no tract indexes of the lands in question. The court stated "Obviously, compliance was impossible and the point does not go to the merits" (App. 61). The reason for requirement of a title certificate was to ascertain the parties claiming interests in the mining claims, so that they could be notified of the pending proceedings. Notice here has been given and received, hence the court's finding that the supposed defect did not go to the merits. The certificate of nonexistence of tract indexes (R. 318) is also said to be contradicted by the affidavit of service (R. 319). This affidavit is not at all inconsistent with the certificate of nonexistence of tract indexes. The affidavit of service states that notice was mailed to persons in three different categories. Appellant falls in category No. 1. In this instance, apparently no persons would be covered by category No. 3. Obviously, the paragraph (which has no application here), which is said to be inconsistent, is but a part of a form letter.

The only possible objection to paragraph No. 3 would be that it was not stricken from the form letter. This is but a nit pick of no consequence. It should, in addition, be noted that appellant has not challenged the truth of the Government's certificate of nonexistence of tract indexes or that, in fact, it had actual notice of these proceedings.

II

THERE IS NOTHING IN THE RECORD WHICH SUPPORTS THE APPELLANT'S CHARGE THAT THE HEARING EXAMINER WAS BIASED

Appellant argues that, because the hearing examiner signed the notice of hearing, he is both prosecutor and judge and thereby violates the principle that one who is engaged in a prosecuting function shall not judge (Br. 41). The Surface Resources Act provides in pertinent part (30 U.S.C. sec. 613(c)):

> * * * notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.

The Department's regulations dealing with this subject are contained in 43 C.F.R. part 1850. Particular attention is directed to sec. 1852.3-2, supra. It is expressly provided by

this section that the examiner will give a notice which shall contain, among other things, "the matters of fact and law asserted." This, the examiner has done, and, for this act of informing the appellant of what the issues to be heard at a hearing are, he is charged as being engaged in a prosecutor function. This charge is patently ridiculous. It produces an absurdity. Appellant would require (again a pure formality) having some other government employee give notice of the hearing examiner's schedule of cases.

The district court, in considering this argument, had this to say (App. 56-57):

> Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt <u>merely informed</u> the

> plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act: * * *.

III

THE SECRETARY'S DECISION IS BASED UPON SUBSTANTIAL EVIDENCE

This Court, in Henrikson v. Udall, 350 F.2d 949, 950 (1965) held:

> It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed.

See also Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

The district court in this case stated (App. 64):

> Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The court went on to hold (App. 65-66):

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 69 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

> To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

Whether a valid discovery has been made is a question of fact, the decision of which by the Secretary of the Interior, based on substantial evidence, is conclusive, in the absence of fraud or imposition, and none is claimed in this case. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963). Even though a court in a trial de novo might have arrived at a different result, it may not substitute its judgment for that of the administrative agency expert in its field.

The decision of the Secretary of the Interior explains in considerable detail why the examiner found that no discovery had been made as of July 23, 1955, on appellant's mining claims. In order to reduce the size of this brief, we have not duplicated the Secretary's comprehensive review of the facts and evidence that is the basis of his decision. This material is contained in the Secretary's decision (R. 17-48)

and treats in detail the conflicts in the testimony. The district judge stated (App. 67): "I find myself in full agreement with the summarization by the Secretary in his decision." We submit that the evidence upon which the Secretary's decision was based, as shown by his decision, is substantial and fully supports his decision.

IV

THE RECORD AMPLY SUPPORTS THE SECRETARY'S FINDING THAT A VALID DISCOVERY HAD NOT BEEN MADE ON THE BONANZA CLAIM

Appellant, in its brief (pp. 32-36), assumes that the evidence which it presented as to the existence of a substantial body of ore is conclusive as to whether a valid discovery has been made. The district court, at page 19 of its opinion (App. 67), covers the question of whether a valid discovery has been made. Also included on page 21 of the court's opinion as footnote No. 7 is the summarization of the Secretary on this question (App. 68), with which the district judge found himself in full agreement. Again, the district court considered the question of whether a valid discovery had been made on the Bonanza claim in its order dated November 30, 1966, which is reproduced as part of the appendix to this brief. At page 2 of this order (App. 72), the court states:

> It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.
>
> I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

The conclusion of the Secretary, with which the district court found itself in full agreement (App. 68), states that: "The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value."

Appellant here has simply refused to accept a factual finding adverse to it. Obviously, there is substantial evidence to support the conclusion of the Secretary and the district court that a valid discovery had not been made within the limits of any of the subject mining claims.

Appellant argues that the contestant did not plead or prove a prima facie case as to each of the contested claims (Br. 36). In view of the existence of only two corner posts (infra, p. 37), acceptance of the argument would have made contest impossible. It is also argued that it was not put on notice as to the challenge of each of the 22 claims. The published notice clearly covered any mining claim or claims within the area described in the notice (R. 320). This is obviously notice and, as the district court held (App. 63):

> Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

The Secretary had also considered this argument and concluded that the notice reasonably apprised the appellant of the issues (R. 29) and that, if there were any uncertainty, this could have been resolved by a pre-hearing conference (R. 30). The Secretary also reviewed the provisions of the mining laws pertaining to the location of mining claims, which expressly state that no location of a mining claim shall be made until the "discovery of the vein or lode within the limits of the claim located." R.S. sec. 2320 (1875); 30 U.S.C. sec. 23 (1964).

The Secretary concludes that "Appellant's attorney is an experienced attorney in mining cases and it is extremely doubtful that one of his acumen misunderstood the charge" (R. 30), and that (R. 31): "Nevertheless, despite these contentions, after reviewing the record made at the hearing it is apparent that appellant's attorney attempted to produce as much evidence as possible to show a discovery on as many of the claims as possible and that the failure to relate some of the reports to a particular claim was because of the inability of the witnesses to lay a proper foundation to show their relevance to a given claim. We must conclude that the record fails to show that the appellant was misled by the first charge."

Appellant argues that, by not offering evidence separately as to each of the 22 mining claims, the burden of proof has not been carried by the administrative agency. The transcript of the hearing shows clearly why evidence was not presented as to each separate claim. The mining engineers of the administrative agency spent three days in examining the subject claims, but the appellant's representatives who accompanied them could not point out any corners on any of

the claims (Tr. 14). Therefore, the appellee's mining engineers did the only thing they could do--they examined all the points that were pointed out by appellant's representatives (Tr. 9, 42). Most of the time that appellee's mineral examiners were on the claim they were accompanied by several representatives of the appellant (Tr. 12, 41, 42). Clearly, the appellee does not have the responsibility of making a discovery for the appellant. If there are no discovery points that can be shown by the mining claimant, then it would appear that the testimony of the appellee's examiners as to the nonexistence of a discovery on a claimed location shifts the burden of proof as to the existence of a discovery to the appellant. Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959). What the appellant by this argument has attempted to do is to simply reverse the burden of proof and have the appellee prove the nonexistence of what the appellant first must show actually existed.

Appellant has made several allegations concerning the appellant's expert witnesses' qualifications in an attempt to show the lack of evidence to support the administrative agency finding of no discovery (Br. 38). The district court stated (App. 64):

> Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The record shows that the mining claims were examined by a graduate mining engineer with extensive practical experience (Tr. 4, 6), and a graduate geologist who has been employed as a geology and mining engineer by three government agencies (Tr. 39, 40). A detailed answer to all of appellant's suggestions of inadequacies in the examination practices of the appellee's experts is set forth in the appellee's reply brief in the district court to which we refer the Court and have not duplicated in this brief (R. 285, 293-296, 302).

The second charge brought against the subject mining claims was that (R. 21):

> (b) The boundaries of the claims are not distinctly marked on the ground.

Appellant, in its argument (Br. 39-41), has ignored this specific charge and argues about facts and issues which are not really in issue. It is not disputed that the evidence conclusively shows that, at the time of the mineral examination,

the boundaries of the claims were not marked distinctly on the ground. The hearing examiner found that the evidence indicated that there were only two known corner posts for the 22 claims involved (App. 46). All that appellant was able to show were maps showing claim boundaries. The district court held that (App. 66): "The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards."

The need for readily ascertaining the boundaries of mining claims is obvious. Unless the boundaries are evident, no decision could ever be made as to the exact place where the Government has the surface management rights and where it does not. The Secretary found that (R. 33): "In the record of this case there is insufficient evidence to show whether or not the claims here were ever properly marked. There is evidence to show that, at the time the Forest Service examiners visited the claims there were inadequate markings to identify the claims properly." The one mining claim which the hearing examiner found to be valid, which was subsequently on appeal determined to be invalid, also lacked properly

marked boundaries. The boundaries could not be readily delineated and, in fact, its boundaries were required to be shifted and remonumented, so that vein passed through the end lines of the claim rather than the side lines (R. 21-22, 36).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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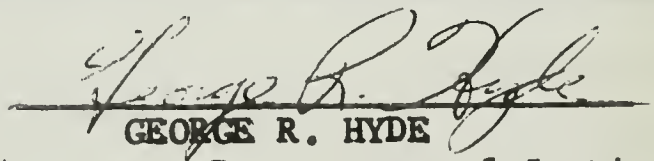
JULY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	CIVIL NO. 65-581
INDEPENDENT QUICK SILVER CO., an Oregon corporation, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	CIVIL NO. 65-590 OPINION

KILKENNY, DISTRICT JUDGE:

FACTS IN GENERAL

These cases are considered together, as they present many common questions of law and fact. The chain of events culminating in this review began with two hearings in Portland, United States v. Converse (Contest No. 011195-D) and United States v. Independent Quick Silver Co. (Contest No. 06189-A). The hearings were initiated by the Forest Service, United States Department of Agriculture, pursuant to Section 5 of the Act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (Supp. 1965).

The statute, popularly known as the Surface Resource Act, provided in general that rights under any mining claim located after July 23, 1955, the date of the Act's passage, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. It also provided that no mining claim located after that date could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing. The purpose of this statute was not to abolish mining claims or to significantly alter mining law, but to limit the use, or misuse, of surface resources (such as timber or peat) by a mining claim- and prior to the issuance of a patent, and it applies only to mining claims located after July 23, 1955.

Consequently, if a mining claim was in all respects valid prior to July 23, 1955, it was not subject to the right of the United States to manage and dispose its surface resources. But because a mining claim is not considered valid until (a) the boundaries of the claim are marked and until (b) a discovery of a valuable mineral deposit has been made, it became necessary in many instances to make investigations and hold hearings to determine whether or not both of these

prerequisites were met prior to the date of the Act's passage. The Act contained detailed provisions for these proceedings.[1] It was pursuant to these provisions that the two hearings here in question took place.

The first hearing, United States v. Converse, transpired June 11, 1962, and involved two mining claims.[2] The second hearing, United States v. Independent Quick Silver Co. took place October 1, 1962, and involved twenty-two mining claims.[3] Both of these hearings were presided over by Graydon E. Holt, hearing examiner for the Bureau of Land Management, who was then stationed at Sacramento, California.

1/ See 30 U.S.C. § 613 (a) to (e) (Supp. 1965.)

2/ Paymaster and Edith Lode, embraced within Secs. 1 and 2, T. 12 S., R. 4 E., W.M., Oregon, (Willamette National Forest), Recorded in Book 8, Pages 214 and 215, Official Records of Linn County, Oregon.

3/ Happy Chance, Prospect, Crystal, Pioneer, Ruby, Bonanza, Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green Back, Columbia, Eastern Star, Cosmopolitan, Princess, Commodore, Aetna, Ajax, Aztec, Cornucopia and Jewell Mining Claims, embraced within Sections 17, 19, 20, and 21, T. 14 S., R. 20 E., W.M., Crook County, Oregon.

UNITED STATES v. CONVERSE

At the Converse hearing, the mining claimant Converse filed a motion to change the hearing examiner and filed an affidavit in support of that motion, charging the hearing examiner with bias and prejudice. The motion was denied because not timely filed, and the hearing continued. From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the Mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of $91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were

inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that "exploration and development," as used in mining laws are not synonomous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

UNITED STATES v. INDEPENDENT QUICK SILVER CO.

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidavit,

charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. § 1006 (a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface Resources Act.

Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation; the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resources Act, but that the hearing examiner

erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing Examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

CONTENTIONS

Converse and Independent Quick Silver Co., as plaintiffs, are before this Court, in separate actions, in an attempt to vacate the decisions of the Secretary of the Interior, through his duly authorized Assistant Solicitor, whereby all the mining claims in question were held subject to the restrictions of the Surface Resources Act. Both parties have moved for summary judgment based on the record in the administrative file. Review of Secretary Udall's decision may be had under the Administrative Procedure Act, 5 U.S.C. § 1009. Jurisdiction of this Court is based upon that section and upon 28 U.S.C. § 1331. Venue is laid under 28 U.S.C. § 1391 (e). In both cases, plaintiffs make the following main contentions:

(1) that plaintiffs were denied due process, for they were compelled to try their cause before a hearing examiner who was biased as a matter of law and as a matter of fact;

(2) that due process was violated because the Secretary of the Interior lacked authority and jurisdiction, by his failure to follow Section 5 (a) of the Act of July 23, 1955, 30 U.S.C. § 613 (a);

(3) that due process was violated because the Secretary's decision was based on charges different from those laid, for the hearing examiner switched the charges laid to a different charge during the hearing.

Plaintiffs then make several contentions which attack the merits of the two decisions. They are:

(4) that the government had failed in its burden of proof, as it did not establish a prima facie case by substantial evidence;

(5) that error had been committed in finding the claims subject to the restrictions of the Surface Resources Act, as the record shows that a valuable deposit of ore was discovered on the claims prior to July 23, 1955.

The United States, as defendant in both these actions, contends that the decisions of the Department of the Interior holding that the government has the surface management rights until such time that patents are issued for the mining claims must be affirmed, as they are fully supported by substantial evidence in the administrative records.

DISCUSSION

Alleged Bias of Hearing Examiner Holt

Independent Quick Silver Co.

In Independent Quick Silver Co., plaintiff insists that Hearing Examiner Holt was biased both as a matter of fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff argues that the hearing examiner signed the Notice of Hearing, that the Notice of Hearing should be treated as a complaint in this case, and that, therefore, the hearing examiner both laid the charges and sat in judgment on his own charges. Plaintiff contends then, that this combination of the prosecuting and judging functions violates both the Administrative Procedure Act and the due process clause of the United States Constitution.

As its basis for arguing bias as a matter of fact, plaintiff calls attention to his motion for change of hearing examiner and supporting affidavit. At the outset of the hearing in question here, the mining claimant attempted to call the hearing examiner as a witness, in support of the charge that he was prejudiced and had pre-judged the case.

When the hearing examiner declined to testify, the mining claimant made an offer of proof "to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had pre-judged the case, and, therefore, was prejudiced." The hearing examiner then stated he would not comment on the offer of proof, and plaintiff argues that by passing over the matter without comment the hearing examiner admitted that the charge was correct.

The affidavit signed by the President of Quick Silver is set forth in the footnote.[4/]

Plaintiff's motion for a change of hearing examiner was denied by Hearing Examiner Holt, on the ground that the motion was not timely filed as required by 5 U.S.C. § 1006 (a).

Converse

In Converse, plaintiff also argues that Hearing Examiner Holt was biased both as a fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff utilizes the same arguments made in Quick Silver, i.e.,

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4/ "I have ascertained and therefore aver that Graydon E. Holt, Hearing Examiner, has never decided a mining case in favor of mining claimants with respect to the question of sufficiency of mineral discovery in any case involving Oregon lands. That the members of my Company are not agreed and feel that they can not have a fair and impartial trial of their case before Graydon Holt, Hearing Examiner."

that, by signing the Notice of Hearing, Hearing Examiner Holt in effect signed the complaint, and thus took part in the prosecution of the case he later heard.

The basis for arguing bias as a matter of fact is slightly different in this case. An affidavit was filed at the outset of the hearing, in which Converse stated that Hearing Examiner Holt had heard a previous case in which Converse was a mining claimant, and that the case was decided adverse to himself. The balance of the affidavit is set forth in the footnote. 5/

5/ "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has prejudged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by Graydon E. Holt. That I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; that he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy."

Attorney for plaintiff Converse made a motion for change of hearing examiner under the Administrative Procedure Act, 5 U.S.C. § 1006 (a), and asked to call Hearing Examiner Holt to testify in order to prove the averments in Converse's affidavit. The motion for change of hearing examiner was denied, on the ground that it had not been timely filed, and Hearing Examiner Holt refused to testify. The following colloquy then took place between the hearing examiner and Murray, attorney for plaintiff Converse:

> "MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?
>
> HEARING EXAMINER HOLT: That's correct.
>
> MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?
>
> HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

Plaintiff Converse argues that the hearing examiner's statement, "I don't deny the facts," is an admission of the truthfulness of all the allegations set out above in the affidavit, and that it, therefore, establishes bias in fact.

The Applicable Law

In NLRB v. Acme-Evans Co., 130 F.2d 477, 482 (7th Cir. 1942), the Court stated: "The heat of the contest has, we think, led respondent to attribute bias because of the intensity of its own feelings." Those words seem appropriate here, for when the assertions of bias in these cases are closely scrutinized, it seems quite clear that intense feelings are all plaintiffs have been able to muster. The briefs, especially on this point, are pregnant with inference, inuendo, and inapplicable (or non-existent) law, but woefully lacking in anything else. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

A hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the parties. NLRB v. Donnelly Garment Co., et al, 330 U.S.

219 (1947). In the light of this opinion, Converse's allegation that Hearing Examiner Holt had ruled against him in a previous case, is, in itself, of no importance.

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail.[6/]

Anyway, plaintiffs have not even attempted to show personal bias on the part of Hearing Examiner Holt. He was most solicitous of their feelings at the hearing, and overruled most of defendant's objections, while at the same time sustaining plaintiffs on many of the "grey" points. In Converse,

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6/ "It has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592 (7th Cir. 1945).

as an example, Holt excused one of plaintiff's witnesses after lengthy direct examination, and stipulated that cross-examinati could be taken at a later date, because the witness did not want to continue on the stand and had had heart trouble in the past. Hearsay evidence was often admitted into the evidence for plaintiffs by Holt, over objections by government counsel. In short, he, throughout both hearings, went out of his way to accomodate [sic] plaintiffs.

The rule that applies to federal judges does not here apply. One of the leading authorities in administrative law, states:

> "Unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit." Davis, Administrative Law Text, p. 223.

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing,

is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

> "The APA says nothing about combination of instituting proceedings with judging. Under the Act, the same individual may 'accuse,' in the sense of deciding that proceedings should be instituted, and may also judge." Davis, Administrative Law Text, p. 242.

Support is found in a law review survey of the law in this area. Note, "Disqualification of Administrative Officials for Bias," 13 Vand. L. Rev. 712, n. 65 (1960).

In Independent Quick Silver, plaintiff argues that by passing over the offer to prove that he was biased without commenting on it, Holt admitted that the charge was correct. Plaintiff has not cited any law which indicates silence can be construed as assent in such a situation. On the other hand, United States v. Morgan, 313 U.S. 409 (1941), supports the opposite view.

In Converse, plaintiff argues that when Holt, in denying the offer of proof that he was biased, stated: "I don't deny the facts. I just deny the motion.", he admitted the truthfulness of the allegations contained in the affidavit. One must be a gymnast in semantics in order to arrive at this conclusion. The statement, when read in context, lends nothing to plaintiff's position.

Both motions for change of hearing examiner were denied on the grounds that they were not timely and sufficient as required by 5 U.S.C. § 1006 (a). There seems to be a substantial basis in the administrative record for this determination.

Regarding the timeliness of the motion in Converse, even though Hearing Examiner Holt signed the notice of hearing, and even though the plaintiff had been in correspondence with Holt, in his official capacity, for some time prior to the hearing, plaintiff insists that the motion for change of hearing examiner could not have been made prior to the start of the hearing, because he did not even suspect Holt was to hear the case. The record anchors a finding that plaintiff knew for

some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

In Independent Quick Silver, the motion for change of hearing examiner and supporting affidavit were not "sufficient," inasmuch as they show no real basis for concluding bias. Moreover, the motion does not seem to have been "timely" presented, at least under the circumstances of this case. The motion was not mailed to Holt, at his Sacramento office, until September 26, 1962, five days before the hearing started. Plaintiff states that this was the first date that it "chanced upon the information that Mr. Holt intended to preside." But plaintiff had written to Holt, in his official capacity, some five months prior to the hearing, asking for a postponement. It is the practice of the hearing examiners' office at the Bureau of Land Management to have the hearing examiner who signs the notice of hearing preside at the hearing and write the decision. The attorney for Independent Quick Silver was experienced with this type of case and should have been aware

of that practice. For that matter, it was he who represented plaintiff Converse at the other hearing in question here, which took place over three months prior to the filing of this motion..

Secretary's Authority and Jurisdiction

Both plaintiffs argue that Secretary Udall has denied them due process and "protection of the law" by failing to follow each jurisdictional requirement of the Surface Resources Act, 30 U.S.C. § 613 (a), the statute which gave him authority to determine title problems with reference to mining claims. In both briefs, plaintiffs set out many instances in which they assert the Secretary did not comply with the statutory requirements. They are listed and discussed below.

1. No head of a Federal Department requested the Department of the Interior to publish notice to mining claimant. The Chief of the Forest Service, in fact, requested the Department of the Interior to publish the notice to the mining claimants.

2. No such request was made which contained a description of the land by sections. This is without foundation, as the requests, in fact, contained such descriptions.

3. The request for publication was not accompanied by the required affidavit of an affiant who had, in fact, examined the lands. The requests, in fact, were accompanied by affidavits of affiants who had examined the lands.

4. No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the lands in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the non-existence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

5 and 6. Plaintiffs allege that the Secretary did not publish notice as required, and that there is no proof of the publication. The affidavits of publication submitted by defendant show that the notices were published.

7. A copy of the publication was not served on the mining claimant as demanded by the statute. This was not done because the affidavits of examination did not show that plaintiffs were in possession of the claims, and, as pointed out

above, no tract indexes were kept of these lands by the counties in which they were situated. However, a man who was found on the claims when the mining engineers examined them was served with a copy of the notice of publication, and the notices were published by the local newspapers in accordance with the regulations. Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service.

Both plaintiffs also argue that the procedure followed by the Bureau of Land Management in initiating contests must be followed in proceedings under the Surface Resources Act. There is no such requirement. The use of a complaint is averted by the publication requirements of that statute.

THE ALLEGED AMENDMENTS

Both plaintiffs assert that due process was violated because the Secretary's decision was based on charges different than those laid, and that the hearing examiner switched the charges during the hearing. This allegation is also without foundation. The Notices of Hearing stated that the questions to be determined would be whether sufficient minerals had

been found within the limits of the claims to constitute a discovery of a valuable mineral deposit, and whether the claims were sufficiently marked. This ground was not changed by the hearing examiner or by either of the two administrative appeals decisions which followed in both cases.

Again, plaintiffs indulge in a play on words. They argue that the notice of hearing said only that the question as to whether mineral discovery had been made within the limits of the claims would be determined. Then they argue that this meant only that their case would be won if they could show a valuable mineral deposit within the boundaries of any of the claims, but that the hearing examiner changed the charges by requiring that a valuable mineral deposit be proven in each and every claim. Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

Plaintiffs make much of the fact that the hearing examiner admitted samples taken by the government after the effective date of the Surface Resources Act, while at the same

time denying plaintiffs' motion to admit some samples taken after that date. The issue is not whether there was a discovery at the date of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

EFFECT OF THE DECISIONS

The Ninth Circuit Court of Appeals has held that:

> "It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." Hendrickson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision. A discussion of some of plaintiffs' arguments which attack the merits of these decisions follows.

BURDEN OF PROOF

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 68 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent,

capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

BONANZA CLAIM

One more problem which is worthy of discussion is the finding of the hearing examiner in Independent Quick Silver that the Bonanza Claim was valid. The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards. This fact was recognized by the examiner, but apparently overlooked when preparing his finding on the validity of the claim. Moreover, he assumed that certain improvements were within the

boundaries of the claim, despite the fact that no substantial evidence was placed in the record in any way showing that fact.

As pointed out by the record on administrative appeal, the testimony of a Mr. Hogg, on which the hearing examiner relied, was grounded on hearsay. The witness based his testimony, not on his own knowledge, but on information supplied to him by a Mr. Champion, now deceased. The alleged summarization of Champion's panning estimates were not understood by the witness, nor could he make an explanation thereof. Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim. In any event, there is no substantial evidence that the samples were produced from the earth within the boundaries of the Bonanza Claim, even if legal boundaries in fact existed. I find myself in full agreement with the

summarization by the Secretary in his decision. 7/

Although other contentions are made by the respective plaintiffs, I feel they are so intertwined with the subjects here discussed that further analysis is not required. It is sufficient to say that I find no substance in such contentions. Overall, the determination of the Secretary in each case must be affirmed.

7/ ". . . Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was hearsay where there was no opportunity for cross-examination and proper delineation of the purported facts shown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed.' This is the test for establishing a discovery in this case. . . ."

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

The decision of the Secretary in each case must be affirmed.

DATED this 14th day of September, 1966.

John F. Kilkenny
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FORD M. CONVERSE, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	CIVIL NO. 65-581
INDEPENDENT QUICK SILVER CO., an Oregon corporation, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	CIVIL NO. 65-590 ORDER

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that

the six samples of ore taken by the contestant all came from one of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forect Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination. Although the Solicitor might have disregarded

some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a discovery" has been made. The opinion of the Assistant Solicitor s given complete support by United States v. Altman, et al, 8 I.D. 235, 237-8 (1961), from which I quote:

> "There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is

> often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumb Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

John F. Kilkenny
District Judge